No. 2681

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK EGGERS, as Sheriff of the City and County of San Francisco, California, SOPHIE SUTER, SOPHIE SUTER, as Executrix of the Will of Daniel Suter, Deceased, and OTTO TUM SUDEN,

Appellants,

vs.

AUGUST FERDINAND KRUEGER (otherwise Kruger), Administrator of the Estate of Anna Maria Krueger (otherwise Kruger), Deceased,

Appellee.

Upon Appeal from the United States District Court for the Northern District of California, Second Division.

BRIEF FOR APPELLANTS.

EDWARD C. HARRISON,
MAURICE E. HARRISON,
Solicitors for Appellants.

Filed this.....day of March, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF FOR APPELLANTS.

Statement of Facts.

This is a suit in equity to enjoin the enforcement of a judgment in the state court for the recovery of certain real property situated in San Francisco.

The appeal is by the defendants from an interlocutory order granting an injunction.

The controversy between the parties is mainly concerned with the validity and legal effect of certain judgments and proceedings which, for the sake of clearness, may be enumerated as follows:

1. An action brought in the state court in 1902 by the Hibernia Savings and Loan Society against John Farnham, as the then administrator of the appellee's intestate, Anna Maria Krueger, for the foreclosure of a mortgage upon the property in question, in which a decree of foreclosure was rendered. This action will be referred to in the course of this brief as the foreclosure action.

2. An action commenced in the same court by the appellant Sophie Suter, as executrix of the will of Daniel Suter, deceased, against the appellee August F. Krueger, to recover the possession of the property. It is the judgment in this action the execution of which is restrained by the order appealed from. For convenience, this may be called the ejectment action.

3. Reference will also be made to a suit in equity in the United States District Court, between the same parties and brought for the same relief as the one now before the court, which other action may be conveniently described as the first injunction suit.

4. Finally, there is the present, or second injunction suit, seeking to enjoin the execution of judgment in the ejectment action.

The bill in this case alleges that Anna Maria Krueger died intestate on May 1, 1902, leaving as her only heir, her son, the plaintiff and appellee, August Ferdinand Krueger; and that at the time of her death she was the owner of the property in dispute, subject to two mortgages, one to the Hibernia Savings and Loan Society and another to Daniel Suter. After her death, John Farnham, public administrator of the City and County of San Francisco, was duly appointed her administrator.

Thereafter, in November, 1902, the Hibernia Bank brought the foreclosure action, joining as defendants, Farnham, as administrator of Anna Maria Krueger, deceased, and also Suter, the other mortgagee. The bill then goes on to allege that there was no service of summons on Farnham in this action and "that no answer, appearance or demurrer was ever filed in said action * * * by the said administrator, or by any person in his behalf." The defendant Suter filed an answer praying for the foreclosure of his mortgage, and judgment was entered for the foreclosure of both the bank and the Suter mortgage, and for the appointment of B. P. Oliver as Commissioner to sell the premises. At the sale under this judgment by Commissioner Oliver, the defendant Daniel Suter purchased, and received a certificate of sale. The bill also alleges that no deed was made by the Commissioner to Suter "conveying the title to said property", but as a certified copy of the deed was produced on the hearing, and no effort made to deny its genuine-

ness, this allegation must be treated as a pure conclusion of law. In April, 1904, plaintiff and appellee, August F. Krueger, having, as the bill states, discovered the facts regarding the foreclosure decree, petitioned for his own appointment as administrator of his mother's estate in the place of Farnham, and after having been appointed as such administrator, moved the court in the foreclosure action for an order setting aside the decree of foreclosure, on the ground of want of jurisdiction. This motion of the new administrator, it is alleged, was granted, and an order was made purporting to set aside the former decree of foreclosure.

In 1913 Daniel Suter died, and the defendant Sophie Suter was duly appointed his executrix. In the same year she brought the action of ejectment in the superior court against August F. Krueger. Trial of this action was had before Hon. Geo. A. Sturtevant, one of the judges of said Superior Court, in 1914, the defendant therein, August F. Krueger, appearing personally and also by Otto tum Suden, his guardian *ad litem* appointed by the court. After this trial judgment was rendered for Krueger, the defendant in the ejectment action. Thereafter, it is alleged in paragraph XIII of the bill, tum Suden, the guardian *ad litem* of Kruger, agreed with the attorneys for the plaintiff, that this judgment might be set aside, and that the cause might be retried, and it was again tried on July 11, 1914, and the guardian *ad litem* permitted judgment on this second trial to go in favor of the

plaintiff for the recovery of the property, thereafter informing Kruger, the defendant therein and the plaintiff and appellee herein, that Sophie Suter, as executrix, the adverse party, had paid, under an order of compromise of the said superior court, the sum of $1500.00, of which the guardian *ad litem* was to retain $250.00 as his compensation. Outside of mere verbiage and conclusions of law, these are the only facts stated in the bill which have any bearing on the obtaining of the judgment in the action of ejectment, which appellee wishes to be relieved against. The remainder of the bill asserts threats by the defendants herein to enforce the judgment in ejectment; that the value of the property is $18,000.00; that plaintiff herein has offered to pay to Sophie Suter, executrix, defendant herein, all moneys due her deceased husband, "the money to be obtained by a sale" of the said property; and that plaintiff has paid the taxes on the property since the rendition of the foreclosure judgment. The bill alleges the citizenship of the plaintiff but not of the defendants.

The foregoing are in substance, the material allegations of the bill in this cause. We have separated them from the other facts developed at the hearing, because we wish to ask this court, not merely to reverse the order granting the injunction, but also to dismiss the action, as being wholly without merit, in accordance with the practice in such cases.

On the day after the bill in this suit was filed, there was issued an order to show cause why an injunction against the enforcement of the ejectment judgment should not issue, and a temporary restraining order. Upon the return of the order to show cause, the respondents and defendants made a complete showing, by affidavits and other documentary evidence, regarding the allegations of the bill; and with the exception of a few matters of detail, to be hereinafter noted, the facts were not disputed.

It appeared that the ejectment suit was begun in the superior court of San Francisco on August 5, 1913; that summons was duly served on August F. Krueger, the defendant therein and plaintiff herein; and that he failed to appear within the time allowed by law and was in default, but that the attorney for the plaintiff Sophie Suter did not take his default because of his belief of Krueger's incompetence. Subsequently Krueger served and filed an answer, which is set out in full at pages 52 et seq. of the transcript, stating no defense to the action, and exceedingly rambling and incoherent in its expression. Mrs. Suter's counsel, however, because of his belief that Krueger was *non compos mentis,* did not apply for a judgment on the pleadings, but instead applied to the court in which the action was pending for the appointment of a guardian *ad litem* to represent Krueger in the defense of the action, the application being based on the ground of incompetency. Thereupon, on

September 17, 1913, the court made an order to show why a guardian *ad litem* should not be appointed. This order to show cause was served on Krueger by the sheriff, and upon its hearing, the court found and adjudged that he was incompetent, and appointed Otto tum Suden, an attorney at law, to represent him as guardian *ad litem.* These proceedings were not questioned by Krueger in this suit, and were alleged by him under oath in his bill in the first injunction suit (trans. p. 75).

Thereafter tum Suden, the guardian *ad litem,* appeared and by his answer and an amendment thereto denied the allegations of the complaint, and pleaded the defense of the statute of limitations.

Trial was had of the ejectment suit on December 9, 1913, at which trial the guardian *ad litem* was present; and also "the said Krueger was present at such trial, and to the extent that he was mentally able to do so, participated in the same, and counseled with, and assisted his guardian *ad litem* in his conduct of the defense to said action".

Regarding the evidence adduced at this trial, there are one or two details in which the affidavits of Edward C. Harrison (for the defendants) and Warner Temple (for the plaintiff) are in conflict. As Mr. Temple, in his affidavit, asks leave to refer to the transcript of testimony of the trial as to such conflict (trans. pp. 67-68), and as this transcript, duly certified, was admitted in evidence and forms a part of the record (pp. 78 et seq.), it may

be considered as controlling as to what testimony was before the superior court on the first trial of the ejectment suit.

Therefrom it appears that upon the cause being called for trial, plaintiff Sophie Suter introduced in evidence a deed from defendant to his mother Anna Maria Krueger and a commissioner's deed from B. P. Oliver, the commissioner appointed in the foreclosure suit, to Daniel Suter, plaintiff's testator. The defendant August Krueger was then called as a witness for plaintiff, but his guardian *ad litem* objected to his testifying on the ground of his incompetency, and the court then examined him to determine his competence to testify, and held that he was incompetent, and refused to allow him to testify. After plaintiff rested, defendant called as a witness Warner Temple, who had been Krueger's attorney in the foreclosure suit, and who, though not employed in the ejectment suit, is now representing Krueger in the present proceeding. Mr. Temple testified that after judgment had been rendered in the foreclosure suit, Krueger consulted him about an appeal therefrom, about five or six weeks before the expiration of time to appeal. He procured the issuance to Krueger of letters of administration of his mother's estate on May 20, 1904, and an order was made substituting Krueger for Farnham as a party defendant in the foreclosure suit. Upon his employment he examined the records in the foreclosure suit, and found that although the register showed that an affidavit of service

of summons had been made, there was no such affidavit on file, and furthermore that there was no answer on file on behalf of the defendant Farnham, as administrator. Thereupon Temple made a motion to set aside the decree on the ground that it erroneously recited that Farnham had filed an answer whereas in fact he had not. This motion was by the court denied, and on motion of Daniel Suter, an order was made permitting the filing of an answer by Farnham nunc pro tunc. Thereafter Temple, as attorney for Krueger, appealed from this order, and when the judge was about to settle the bill of exceptions on this appeal, he announced a change of mind with regard to his ruling on the motion, and told Temple that if he would renew the motion, he would grant it. Temple did renew the motion to set aside the decree, and the motion was granted, on or after September 5, 1905 (p. 82).

On cross-examination, the witness Temple testified that the foreclosure judgment was rendered June 16, 1903; that Krueger first called on him in May, 1904, and that upon his examination of the record at that time, he found that Daniel Suter had bought the property at foreclosure sale from Oliver, the commissioner. The decree of foreclosure recited the appearance of counsel for Farnham at the trial.

The following testimony on cross-examination is especially important:

> "I first made my motion to vacate the judgment the same day I got Mr. Krueger appointed

> administrator of his mother's estate, or the next day. I first had him substituted as defendant in the case. I then filed a motion of appeal from the judgment, and gave $300 bond. I made the motion to vacate the judgment before I served the notice of appeal. In my moving papers I stated the ground of the motion to be for defects apparent on the face of the decree, because, it recited that Mr. Farnham appeared and filed his answer, and there was no answer filed. That was the ground of my motion."

In rebuttal, plaintiff Sophie Suter called Mr. Geo. A. Clough, who testified that he was one of the attorneys for the plaintiff in the foreclosure action, that McGowan and Westlake were the attorneys for the defendant Farnham, as administrator of the estate of Anna Maria Krueger, deceased; that these attorneys served the attorneys for the plaintiff with an answer, that both Mr. McGowan and Mr. Westlake appeared on the trial of the action of foreclosure as attorneys for Farnham, and that the decree recited their appearance. Mr. Clough did not learn until Mr. Temple appeared in the case that the answer which had been served had never been filed.

Such was the evidence before the superior court on the trial of the ejectment suit. It may be summarized as follows: (1) Plaintiff therein made out a prima facie case by proof of deeds from defendant to his mother, and from a commissioner in a foreclosure suit to which the mother was a party. (2) Defendant therein met this by testimony show-

ing that the foreclosure decree had been set aside by an order made fifteen months after its rendition, and based on the ground that the decree falsely recited the filing of an answer. The question before the court was whether the order setting aside the decree was valid (a) when the defendant had served his answer and appeared on the trial and participated therein, and had not applied within six months for relief against the decree; and (b) when an appeal was pending from the judgment, and the trial court had thereby lost jurisdiction of the cause. It may be noted that these questions were not so simple as to require an immediate answer favorable to the ejectment-defendant, August F. Krueger.

At this first trial of the ejectment suit, counsel for the parties overlooked the testimony as to the pendency of an appeal from the judgment of foreclosure (trans. p. 99), and after the submission of the cause, the court, on March 4, 1914, rendered judgment in favor of the defendant. Thereupon in due time plaintiff moved for a new trial, and a bill of exceptions was settled which was in all respects full, fair and correct (trans. p. 98). This bill of exceptions brought to the attention of respective counsel the point already referred to, that the pendency of the appeal from the foreclosure decree rendered the order setting aside that decree beyond the court's jurisdiction, and showed the judgment entered for defendant in the ejectment suit to be therefore erroneous. Negotiations for

a compromise were thereupon opened, the guardian *ad litem* foreseeing that a new trial must necessarily result in a judgment for plaintiff, and realizing also that his ward had no property or means with which to pay the expense of further litigation, and that even if he prevailed, his equity in the property in question would be subject to the mortgages of which the Suter estate would then be the equitable owner. After numerous consultations, tum Suden, the guardian *ad litem,* agreed upon the sum of fifteen hundred dollars as a proper amount to be paid Krueger for his interest in the property, and as the consideration for allowing judgment to go against him. It appears fully from the evidence that this sum was in excess of the value of Krueger's interest in the property. Meanwhile the superior court had granted a new trial of the action, and the cause submitted on the evidence introduced on the first trial. On July 15, 1914, after such second trial, the court rendered judgment for the plaintiff, Sophie Suter, as executrix, this being the judgment whose enforcement is sought to be enjoined in this action. On July 22, Mr. tum Suden, the guardian *ad litem,* filed his petition setting forth the fact that he had agreed with the plaintiff upon a compromise of the dispute for the sum of fifteen hundred dollars, and setting forth also the reasons which impelled him to agree to this compromise (see copy of this petition, trans. pp. 90, 91). The compromise and the considerations and the inducements leading up to it were thereafter fully ex-

plained to the judge who presided at the trial of said action (trans. p. 37), and after such explanation, and on said July 22nd, an order was made by him approving the compromise (which order is set out at page 92 of transcript).

The sum of $1500, theretofore agreed upon, was then paid by Mrs. Suter to Mr. tum Suden, the guardian *ad litem,* and in return he executed a release of errors and waiver of appeal. No part of the $1500 has ever been repaid to Mrs. Suter. Later the court made an order authorizing the guardian *ad litem* to pay to himself as attorney's fees the sum of $250.00 and to deposit the remaining $1250.00 to the credit of Krueger in the German Savings and Loan Society.

Thereafter, on August 5, 1914, Krueger, the ejectment defendant and the plaintiff herein, appeared in the ejectment suit personally and through an attorney, Arthur Crane, other than his guardian *ad litem,* served notice of a motion to set aside all the rulings against him, including the order appointing the guardian *ad litem,* the order granting the new trial, the judgment for plaintiff, the order approving the compromise, and the order allowing the guardian compensation. The motions were made on the grounds that Krueger was competent that the guardian *ad litem* did not have authority to compromise, and that the court was not informed of the facts regarding the compromise. This motion, and the affidavits of Krueger and one Moise, upon which it was made, are set forth at

pages 39 to 45 of the record. The motion came on for hearing on August 7th, and was heard on these affidavits on the one hand, and on the affidavits of Otto tum Suden and Edward C. Harrison on the other; and on August 17, 1914, the superior court duly made its order denying the motions (trans. pp. 45, 46).

Specification of Errors.

The errors relied on in this appeal may be conveniently divided into (A) those which show the insufficiency of the bill, and therefore call for the dismissal of the cause; and (B) those additional considerations which show that upon the facts proved, the order for the injunction was erroneous.

(A) DEFECTS IN THE BILL.

(1) The bill fails to allege the citizenship of the defendants, and therefore does not show any federal jurisdiction.

(2) The bill is without equity, because it shows a plain, speedy and adequate remedy at law by motion in the ejectment action.

(3) The bill is without equity, because it fails to show that the judgment in the state court was obtained by fraud.

(4) The bill is without equity, because it fails to show a meritorious defense to the action in the state court, and particularly fails to show that

appellee, or the estate of which he is administrator, has any interest in the property in dispute.

(B) OTHER ERRORS IN GRANTING THE INJUNCTION.

(5) The injunction is erroneous, because it is directed to an officer of the state court, and stays proceedings on the execution of a judgment of that court, in violation of the statute.

(6) The order granting the injunction is erroneous, because it does not require any security, in violation of section 18 of the Act of Congress of October 15, 1914.

(7) The order granting the injunction is erroneous, because it does not set forth the reasons for its issuance, nor is it specific in its details, nor does it describe in reasonable detail the acts restrained, thereby violating section 19 of the act last mentioned.

(8) The order granting the injunction is erroneous, because it appeared on the hearing that the judgment in the ejectment suit was not obtained by fraud, that appellee is bound by the finding of the state court as to his competency, and further that the judgment in the state court was proper on the testimony before it.

(9) The order granting the injunction is erroneous, because it appeared on the hearing that appellee had attacked the judgment by motion in the state court on the grounds here urged, that he was

fully heard on such grounds, and his motion was denied; and that the denial of such motion is a bar to his obtaining an injunction in this proceeding.

Argument.

We earnestly contend that not only did the trial court seriously err in granting the injunction upon the facts proved at the hearing, but that the bill itself is without equity, and should be dismissed; and we therefore ask not only for a reversal of the order, but also for a direction for such dismissal.

It is now settled law, by the decision in Smith v. Vulcan Iron Works, 165 U. S. 518; 41 L. Ed. 810, that the circuit court of appeals, on an appeal from an interlocutory order, may, if it is of the opinion that the bill is without equity, order its dismissal, in order to save both parties from the expense of further litigation. To the same effect are:

Metropolitan Water Co. v. Kaw Valley District, 223 U. S. 519; 56 L. Ed. 533;

Highland Glass Co. v. Schmertz Wire Glass Co., 178 Fed. 944, 970;

La Hogue District v. Watts, 179 Fed. 690;

Sheffield Co. v. D'Arcy, 194 Fed. 686.

We will therefore discuss first the questions which go to the sufficiency of the bill.

I. THE BILL IS INSUFFICIENT, AND MUST BE DISMISSED, BECAUSE IT FAILS TO SHOW JURISDICTION IN THE FEDERAL COURTS.

There is no showing of any federal jurisdiction in the bill, or elsewhere in the record, except on the ground of diversity of citizenship. And although the citizenship of plaintiff is alleged, there is no allegation whatever of the citizenship of the defendants, or any of them. It therefore necessarily follows that the order must be reversed, and the bill dismissed.

Wolfe v. Hartford Ins. Co., 148 U. S. 389; 37 L. Ed. 493;

Timmons v. Elyton Land Co., 139 U. S. 378; 35 L. Ed. 195;

Horne v. Geo. H. Hammond Co., 155 U. S. 393; 39 L. Ed. 197;

Atlantic Coast Line Co. v. Whilden, 195 Fed. 263.

II. THE BILL IS WITHOUT EQUITY, BECAUSE IT SHOWS A PLAIN, SPEEDY AND ADEQUATE REMEDY AT LAW BY MOTION IN THE COURT IN WHICH THE JUDGMENT WAS RENDERED.

It may be urged that the defect of all jurisdictional averment might be cured by amendment; but the bill is entirely without equity, for failure to show the absence of an adequate remedy at law. In other words, the circumstances are such that plaintiff had a speedy and adequate remedy at law,

and consequently has no cause of action in equity, and the bill should be dismissed.

The bill is one to enjoin the enforcement of a judgment recovered in the superior court of San Francisco, rendered in an action to recover the possession of real property. It attempts to allege, for the purpose of justifying this relief, that the judgment was obtained by the fraud of plaintiff's guardian *ad litem* and the adverse party. Assuming, for the purpose of this point, that there is a sufficient allegation of such fraud, there was open to the plaintiff a sufficient remedy by motion to set aside the judgment made in the court where the judgment was rendered.

And section 473 of the Code of Civil Procedure of California contains the following provision:

> "The court * * * may also, upon such terms as may be just, relieve a party or his legal representative from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect; provided, that application therefor be made within a reasonable time, but in no case exceeding six months after such judgment, order or proceeding taken."

Where a judgment is obtained by fraud, the injured party may obtain redress under this section, as held by the supreme court of California in the following cases:

Craig v. San Bernardino Investment Co., 101 Cal. 122;

McGowan v. Kreling, 117 Cal. 31.

In the present case the bill alleges that plaintiff was informed of the judgment by his guardian *ad litem,* but when this knowledge came to him does not there appear, (but it does affirmatively appear from his affidavit of August 4, 1914, set forth on pages 41 to 43, inclusive, of the transcript, that he knew it in less than four weeks after its rendition); nor is there any allegation that he could not have availed himself of the statutory remedy, or made any effort to do so. The case therefore comes squarely within the rule of the following two cases, holding that under such circumstances there is an adequate remedy at law, and the pleading is insufficient.

Eldred v. White, 102 Cal. 600;
Heller v. Dyerville Mfg. Co., 116 Cal. 127.

Eldred v. White was an action to set aside a judgment on the ground of fraud. The facts bearing upon this question are stated as follows in the opinion of the court:

> "This present action was not commenced until thirteen months after the date of the judgment in the foreclosure suit; and no reason is shown why it was not commenced sooner, or why appellant did not proceed, under section 473 of the Code of Civil Procedure, to obtain leave 'to answer to the merits of the original action', or why he has not exhausted other remedies at law before invoking the aid of a court of equity. There is no averment or finding that he did not know of the former judgment at the time of its rendition."

And a judgment for the defendants was affirmed on the ground that the complaint did not state facts sufficient to constitute a cause of action.

Again, in Heller v. Dyerville Mfg. Co., supra, the action was an equitable one, to modify a judgment on the ground of fraud. The court, speaking through Van Fleet, J., said:

> "In the next place, we think the complaint discloses a case in which plaintiffs had a plain, speedy and adequate remedy at law, and in such case there is no occasion to resort to equity, and it will not be permitted. (Ketchum v. Crippen, 37 Cal. 223; Eldred v. White, 102 Cal. 600). The judgment was entered April 26, 1892. Plaintiffs aver that they had no notice of this fact until 'subsequent to April 26, 1892', but this, under a proper construction of the pleading, is equivalent to the averment that they had such knowledge immediately after that date—as early as April 27th, if need be. (Collins v. Townsend, 58 Cal. 614.) Furthermore, it appears that they at all events had such knowledge on July 29, 1892, on which date they were served with an order to show cause why they should not be held guilty of a violation of the decree. Even the latter date was well within the six months from the entry of the decree within which, under section 473 of the Code of Civil Procedure, they could have moved for its modification. The fact that under a misapprehension of their rights they failed to take advantage of this remedy until too late, affords no ground for equitable relief."

The court then proceeded to hold that inasmuch as the complaint did not state a cause of action, the order for an injunction and the judgment should be reversed.

This rule, that equitable relief may not be had against judgments or other legal proceedings, unless it be shown that plaintiff has been deprived of his complete legal remedy by motion, is also supported by the following cases:

Richards v. Kirkpatrick, 53 Cal. 433;
Moulton v. Knapp, 85 Cal. 385;
Ede v. Hazen, 61 Cal. 360;
Rucker v. Langford, 138 Cal. 611.

The same rule is applied by the federal courts in actions attacking judgments on the ground of fraud. Such was the character of the suit of Nougue v. Clapp, 101 U. S. 551, 25 L. Ed. 1026, where the bill alleged that a certain foreclosure decree in the state courts of Louisiana had been obtained by fraud. It was held that since the state law allowed a motion in its courts in the very action, to set aside the decree, and there was no showing in the bill that the plaintiff had pursued this remedy, the federal courts would not interfere.

In the later case of Marshall v. Holmes, 141 U. S. 589, 35 L. Ed. 870, the bill affirmatively alleged that the plaintiff did not learn of the fraudulent judgment until it was too late to make the proper motion; and on that ground Nougue v. Clapp was distinguished, and in so distinguishing that case, the court says:

> "Here the resemblance between that case and the one before us ends; for in Nougue v. Clapp it did not appear, nor was it alleged, that the facts constituting the fraud were not, before the rendition of the decree, within the knowl-

> edge of the party seeking its annulment, or could not have been discovered in time to bring them in some appropriate mode to the attention of the court while the decree was within its control. For aught that appears, that suit was brought simply to obtain a hearing in the circuit court of the United States, sitting in equity, of issues that were, or by proper diligence could have been, fully determined in the suit at law in the state court. The relief there asked could not have been granted consistently with the rule that equity will not interfere with a judgment at law, even where the party has an equitable defense, if he could, by the exercise of diligence, have availed himself of that defense in the action at law to which he was a party. *This requirement of diligence, is, as it ought to be, enforced with strictness.*"

The rule of Nougue v. Clapp, requiring a resort to remedy by motion in the state court, not only as a speedy and adequate remedy at law under the general principles of equity jurisprudence, but also as a measure to be enforced for the preservation of comity between state and federal courts, has been repeatedly followed.

Graham v. Boston R. Co., 14 Fed. 753; affirmed at 118 U. S. 162; 30 L. Ed. 196.

Again, in Travelers' Association v. Gilbert, 111 Fed. 270; 55 L. R. A. 538, the circuit court of appeals affirmed the dismissal of a bill seeking relief against a judgment on the ground of fraud, because a remedy by motion existed under the state statute.

To the same effect is

Folsom v. Ballard, 70 Fed. 12.

The authorities bearing upon this question of the necessity of showing the absence of an adequate remedy at lay are so numerous that it would be an unnecessary imposition on the court's time to cite and discuss them all. It will suffice to call attention, in conclusion, to a decision of an almost identical case by this court. This case is that of Bower v. Stein, 177 Fed. 673, where the complainant sought to set aside a judgment in foreclosure in the state court, obtained by publication of summons, claiming that this judgment was obtained by fraud. In affirming a decree dismissing the bill for want of equity, Judge Gilbert says:

> "Another ground on which it should be held that there is no equity in the bill is the appellant failed to avail herself of the remedy afforded by the statute of Oregon, which provides that the defendant against whom a judgment is taken on service by publication, may upon good cause shown, and upon such terms as may be proper, be allowed to defend within one year after judgment. Under that statute, it has been held that an allegation that the plaintiff in the action did not try to find the defendant's address may be considered upon a motion to open the decree, Smith v. Smith, 3 Or. 363. According to the allegations of the bill, the appellant had notice of the foreclosure suit in ample time to have availed herself of the remedy so afforded by the state statute. A party who thus neglects to avail himself of the remedies afforded in the state court is precluded from resorting to a federal court to obtain relief against the decree. Nougue v. Clapp, 101 U. S. 551; Graham v. Boston R. Co., 14 Fed. 753, affirmed in 118 U. S. 162."

The remedy discussed in Bower v. Stein, by which the defendant may move to set aside a judgment taken on service by publication stands in the same position as a motion to set aside a judgment, for fraud or inadvertance, under the California Code. Indeed the same section, 473, of the Code of Civil Procedure, which gives the remedy by motion which we insist was adequate in the present case, includes also a provision for the same relief against service by publication which was discussed in Bower v. Stein. If in that case the complainant was obliged to show a deprivation of the statutory right, the appellee is under the same obligation in this cause; and his bill is thus shown to be without equity, under this and the other decisions mentioned above.

III. THE BILL IS WITHOUT EQUITY, BECAUSE IT FAILS TO SHOW THAT THE JUDGMENT IN THE STATE COURT WAS OBTAINED BY FRAUD.

The bill in this case is fatally defective, because it does not state facts showing that the judgment against which relief is sought was obtained by fraud. As will be seen, appellee must rest entirely on this claim of fraud, if he wishes to resist the enforcement of the judgment.

The only allegations of the bill which can have any bearing upon the question of fraud are those contained in paragraphs XII and XIII, on pages 9 to 12 of the record. These allegations contain a

mass of verbiage, by means of which almost every act of the appellants is charged to be fraudulent, and every agreement between them is characterized as a "conspiracy." Such language cannot, of course, supply the absence of the facts constituting the fraud. The facts may be summarized as follows: On August 5, 1913, the appellant Sophie Suter, as executrix, sued the appellee in the state court; that court appointed the appellant Otto tum Suden as guardian *ad litem* of the appellee Krueger, the appellee also appearing in person; the action was tried before Hon. Geo. A. Sturtevant, a judge of that court, on March 3, 1914, and judgment rendered for appellee; thereafter an order of compromise was made by the court, and the guardian *ad litem* agreed with the appellant Suter that the judgment might be set aside, and it was set aside, and the action was brought to trial again. On the second trial no witnesses were called, and in accordance with the agreement between the guardian *ad litem* and the appellant Suter, judgment passed in her favor against the appellee, on July 11, 1914, and the guardian *ad litem* thereafter informed his ward, the appellee Krueger, that under the order of compromise, he had received $1500.00 from the appellant Suter, of which he was to retain $250.00 for his services in the action. It is further alleged that the agreement of compromise was reached without consulting appellee; that appellee was not insane; and that the appellants knew the facts regarding the title to the property in question.

It is to be noted that it appears from the bill itself that

(1) The appellant tum Suden was appointed guardian *ad litem* of the appellee by order of the court in which the action was pending; and there is no claim that this order was induced by any misrepresentation of fraudulent conduct, or that appellee did not have full opportunity to prove his competency. This order then must be treated as valid and binding upon appellee.

(2) It further appears that the dispute between the parties was attempted to be settled by a compromise agreement between the appellant tum Suden, as guardian *ad litem,* and the adverse party, the appellant Suter; but there is no allegation that this agreement was induced by any misrepresentation or other fraud. So far as it went, then, this agreement of compromise was binding.

(3) It moreover appears by inference that the compromise agreement was approved by an order of the court in which the action was pending; and again, there is nothing to show that this order of compromise was procured through any misstatement or suppression of the facts, either on the part of the appellant tum Suden, the guardian *ad litem,* or the appellant Suter, or her attorneys. Neither is there any statement that the judge was a party to any wrongful agreement, or was corrupt, or deceived by any false or misleading statement. It must therefore be assumed that the order approv-

ing the compromise was made by the court with knowledge of all the circumstances, and after a consideration of all the facts before him.

The question, then, resolves itself into this: did the court have the right to appoint a guardian *ad litem* of the appellee, after notice to him and an opportunity to be heard on the question of his competency, and did the same court have the power to approve a compromise between the guardian *ad litem* and the adverse party, without consulting the party so adjudged to be incompetent. These questions find a ready answer in the statutes of California which regulate the subject.

The statute in question is section 372 of the Code of Civil Procedure of California, providing as follows:

> "When an infant, or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian *ad litem* appointed by the court in which the action is pending, in each case. A guardian *ad litem* may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him. The general guardian or guardian *ad litem* so appearing for any infant, or insane or incompetent person in any suit shall have power to compromise the same and agree to the judgment to be entered therein for or against his ward, subject to the approval of the court in which such suit is pending."

In view of the allegations of the bill, it must then be assumed that the court in which the action was pending, without being imposed upon or deceived in any way, and after due hearing, determined that appellee was an insane or incompetent person and that it was expedient to appoint a guardian *ad litem,* and that the appellant tum Suden was so appointed. Upon this appointment the appellant tum Suden became vested with the power, under the statute, "to compromise" the suit "and agree to the judgment to be entered therein for or against his ward," subject to the approval of the court. This power he exercised and obtained the approval of the court to such exercise; and it will not affect the validity of his actions in this regard to call them "fraudulent" and to describe the agreement as a "conspiracy". The appellee had evidently, under the allegations of the bill, allowed himself to be declared incompetent and a guardian *ad litem* to be appointed; and there was no occasion to notify a person who was held to be *non compos,* of the proposed compromise, provided that the court deemed the compromise to be fair. The statute just quoted allowed the procedure which was followed; and indeed, the only difference between that procedure, and the course which would be followed in the absence of statute, is that here the approval of the compromise is left to the court in which the action is pending, whereas otherwise it would be left to a separate tribunal, or at least a separate proceeding, dealing with the guardianship of the incompe-

tent, to pass upon the same question. Whether the statute allows the adjudication of incompetency, and the approval of the compromise, to be made by a separate probate or guardianship court, or by the court in which the dispute is being litigated, is a mere question of expediency, of which the legislature is the sole judge. In either case, the alleged incompetent is entitled to a hearing before being subjected to guardianship; but in either case, if he be once determined to be insane, and a guardian appointed, the guardian represents him, and the court cares for his interests; and if he claims to have recovered his sanity, he must apply again to the same court for restoration to capacity, but he cannot go into another forum and another proceeding and claim that, notwithstanding the adjudication of the court made fairly and with knowledge of all the facts, he was in fact competent and that therefore the acts of his guardian done with the approval of the court were "fraudulent" because of failure to consult him.

The fact that judgment had been rendered in favor of appellee after the first trial does not change the situation. "An action is deemed to be pending from the time of its commencement until its final determination upon appeal" (Code of Civil Procedure of California, section 1049), and when the court, again without any misrepresentation and in the exercise of its jurisdiction, so far as appears from the bill, granted a new trial and vacated the judgment, the situation was the same as before the

judgment was rendered, and under section 372, the guardian *ad litem,* with the approval of the court, might compromise and agree to a judgment to be entered for or against his ward, with or without a trial, and with, or (as the bill alleges), without witnesses being called, and with or without the production of documentary evidence. In the light of the statutory power of guardians *ad litem,* the attempt to charge fraud in the bill loses all substance whatever and becomes a meaningless repetition of the words "fraud" and "fraudulently", with no facts whatever to support the characterization—a position which a court of equity will never tolerate in the pleadings of its suitors.

It is needless to cite authorities for the elementary rule that fraud cannot be charged in general terms, and that a pleading which fails to state the facts constituting the fraud is wholly without equity. We will therefore merely call the attention of the court to a few cases where the pleading was similar to that of appellee in the case at bar, and was held insufficient.

In Heller v. Dyerville Mfg. Co., 116 Cal. 127, the complaint was much stronger than in the present case. It alleged that a judgment was obtained from the court in violation of a stipulation for a different judgment, by the representation of the attorney for the adverse party that it did conform to the stipulation, the representation having been made for the purpose of "cheating and defrauding" the plaintiff, upon which representa-

tion the judge relied in signing the decree. It was also alleged that the judgment was presented for signature and signed without the knowledge of plaintiff. It was held that since there was no allegation of an intent to deceive, or of knowledge on the part of the attorneys of the falsity of the representations, and since the judge and the plaintiff might have ascertained the truth of the representations, there was no case of actionable fraud.

Again, in United States v. Norsch, 42 Fed. 417, the government sued to set aside a decree of naturalization, alleging that an alien, not entitled to be naturalized, applied for that relief, although he knew he was not entitled to it, and the decree was made without examining any witnesses, and without any inquiry by the court, and was procured by "imposition and fraud practised upon the court". It was held that the bill was insufficient, because however morally wrong it might be for a litigant to apply for relief to which he knew he was not entitled, such conduct was not legally a fraud, unless the court had been imposed upon and deceived by some artifice or mistatement, and that the general averments of fraud do not aid the bill in any material respect.

The case of Harbison v. Harbison, 56 S. W. 1006, is so closely similar to the one before the court that it is deserving of especial attention. There a minor sought to set aside a waiver and abandonment of appeal, made on his behalf by his next friend, on the ground that although approved by

the court, the decree of approval was tainted with fraud. The Texas statute, like that of California, permitted a settlement by the next friend, with the approval of the court. It was held that although fraud was alleged in general terms, no sufficient case was stated for the annulment of the decree, because it was not alleged that the court had been deceived by any false representations, into making the decree approving the compromise; and because therefore it must be assumed that the facts were fully before it when the decree was made. This defect, and the failure also to allege that any misrepresentation had been made to the next friend by the adverse party, rendered the minor's petition insufficient, although it was expressly alleged that by the compromise he had lost property of great value, and that the settlement was made without consulting him. A case more nearly identical to the present one could hardly be found.

Not only does the appellee in this case allege no misrepresentation or fraud upon the court; but he fails to show that the judgment sought to be enjoined was based upon the fraud, and resulted from it. Assuming, for argument, that the guardian *ad litem* and Mrs. Suter had made some agreement which was improper or in some was not here disclosed, a fraud upon the rights of appellee, still the court may have, on the second trial, given judgment against him because upon a consideration of the testimony aduced upon the first trial, and before it again by stipulation (which was in fact the case),

it was convinced that the first decision was erroneous. The bill in this respect fails to measure up to the rule announced in the following language in the case of Dringer v. Erie R. Co., 42 N. J. Eq. 573; 8 Atl. 811:

> "A court of equity may unquestionably annul a judgment or decree which has been obtained by fraud; but, in order to justify such an exercise of power, it must be made clearly to appear that the judgment or decree had no other foundation than fraud. In other words, it must be made to appear that, if there had been no fraud, there would have been no judgment or decree."

From the foregoing considerations, it is respectfully submitted that the bill fails as one based upon fraud.

We have said that the bill states a cause of action for fraud, or nothing. However, there is some pretense in the bill, and it was urged by appellee below, that he should be relieved against the judgment against him personally, because he now claims such relief as the administrator of his mother's estate; in other words, that the judgment against him individually does not affect his rights as administrator. We shall discuss this point, not because we believe it gives any standing to the suit, but only because it was relied on in the court below by appellee, and may be urged by him here.

I. The complainant is bound in his representative, as well as in his individual capacity, by the

proceedings and judgment in the action in the state court, because

(a) He was and is the heir of the decedent whose estate he represents, as administrator, and as such heir, entitled to the possession of the property, and his possession is therefore properly referable to such right; as administrator he is privy to his possession as heir; and as heir he is entitled to prosecute or defend the action;

C. C. P., secs. 1452, 1453, 1581;
McFadden v. Ellmaker, 52 Cal. 348;
Tryon v. Huntoon, 67 Cal. 325;
Colton v. Onderdonk, 69 Cal. 155;
Spotts v. Hanley, 85 Cal. 155;
Ryer v. Fletcher Ryer Co., 126 Cal. 482.

(b) Because he actually appeared and defended the action, and, whether or not he fully discharged his duty as administrator by using every defense available to protect the estate, he had the opportunity to do so; and it is immaterial that he did not in making the defense, have himself substituted in his official capacity as the nominal defendant.

Sampson v. Ohleyer, 22 Cal. 200;
Wheelock v. Warschauer, 34 Cal. 265;
Valentine v. Mahoney, 37 Cal. 389;
Russell v. Mallon, 38 Cal. 259;
Chant v. Reynolds, 49 Cal. 213;
Davidson v. Baldwin, 2 Cal. App. 733;
Nickals v. Stanley, 146 Cal. 724, 727;
Estate of Ricks, 160 Cal. 467, 471;
C. C. P., sec. 1908.

II. The action in ejectment was properly brought against the plaintiff individually rather than as administrator.

Ejectment is "a possessory action ex delicto founded upon a trespass, actual or supposed, committed by defendant in wrongfully detaining possession of plaintiff's land."

Henning v. Boyer, 10 Pa. Co. Ct. 506, 508.

No action can be maintained against a personal representative as such for malfeasance, misfeasance, or for a tort.

Eustace v. Jahns, 38 Cal. 3;
Melone v. Davus, 67 Cal. 279, 282;
Sterrett v. Barker, 119 Cal. 492, 494;
Hardy v. Mayhew, 158 Cal. 95, 104;
Heydenfeldt v. Jacobs, 107 Cal. 373, 377;
Nickals v. Stanley, 146 Cal. 724, 727;
Smith v. Wood, 31 Md. 293;
Clapp v. Walters, 2 Tex. 130;
Boyle v. Krauss, 79 At. 1025;
Luscombe v. Fintzelberg, 162 Cal. 433, 443.

Ejectment being a possessory action, it is necessary to make the actual occupant of the premises a defendant; and where the premises are actually occupied, he is the only proper party defendant.

7 Encyc. of Pl. and Pr., 301, 302;
Garner v. Marshall, 9 Cal. 268;
Hanson v. Armstrong, 22 Ill. 442.

IV. THE BILL IS WITHOUT EQUITY, BECAUSE IT FAILS TO SHOW A MERITORIOUS DEFENSE TO THE ACTION IN THE STATE COURT.

In an action for relief against a judgment on the ground of fraud, it is imperative that the plaintiff show that he has a good defense to the original action. Otherwise there would be no avail in the exercise of extraordinary equitable relief against the judgment, for the same result would follow from another trial, and for the lack of such allegations, the bill is without equity.

Burbridge v. Rauer, 146 Cal. 21.

In the present case appellee does not allege either ownership, or any other present interest, in the property, either in himself personally or in the estate which he claims to represent. With great particularity he does allege that his intestate owned the property at the time of her death, and that he, her son, has been in possession ever since; but there is no statement from which it appears that the ownership or right of possession at the present time is with appellee. Under this condition of the pleading, it must be assumed that since the death of appellee's mother, the title has passed from her estate to the appellant Suter, in whose favor judgment went in the state court. We urge this defect in the bill because, if there had been any allegation of title, we would be prepared to show that as to a large part of the property, whatever title was held by the estate of Anna Maria Krueger has come to the appellant Suter by proceedings separate and

distinct from the foreclosure proceedings alleged in the bill. In any event, the defect in appellee's pleading in this respect is so serious as to call for its dismissal.

To remedy this defect, appellee has attempted to plead defects in the foreclosure decree which is one of the sources of title of appellant Suter. But there is no allegation that her title comes solely through the foreclosure decree, so that this point is not adequately met. As far as the alleged defects in the foreclosure proceedings are concerned, it appeared upon the hearing that the allegations of the bill in this regard, so far as material, were false.

The allegation that appellee has stated the facts to certain attorneys, and has been by them advised that he has a good defense, is not a sufficient allegation that he actually *has* such a defense.

Eldred v. White, 102 Cal. 600.

V. THE ORDER GRANTING THE INJUNCTION IS ERRONEOUS BECAUSE IT STAYS PROCEEDINGS IN A STATE COURT.

If any of the points thus far urged are good, the bill must be dismissed, and this proceeding terminated. If, however, the court should for any reason be of the opinion that the bill states a cause of action in equity, still the order granting the injunction is erroneous in several respects.

In the first place, it is in violation of section 265 of the Judicial Code (36 Stat. L. 1162), which is a re-enactment of section 720 of the Revised Statutes, and which provides as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

It may be admitted at the outset, that under the recent decision of Simon v. Southern Railway Co., 236 U. S. 115; 59 L. Ed. 492 (settling what was therefore a disputed question in the federal courts), a federal court may enjoin a party who has obtained judgment by fraud from making an inequitable use of that judgment. But in the present case, the injunction runs, not merely against the successful party in the state court; but also against its officer, the appellant Eggers, who is the sheriff of San Francisco, and who, the bill alleges, is about to execute a writ of possession from the state court and thereby dispossess appellee. The prayer of the bill is that an injunction issue that "said defendants, and each of them, do not further take or cause to be taken, any further steps in the proceedings or premises" (trans. p. 18), and the order appealed from is "that defendants be restrained as prayed for in the bill" (trans. p. 72). The injunction, then, is one against the officer of the state court, forbidding him from executing the process of that court.

Under Revised Statutes, sec. 720, and its re-enactment in section 265 of the Judicial Code, a federal court, while it may enjoin a party from inequitably taking advantage of a judgment of a state court, may not issue an injunction against any officer of the state court, nor may it interfere with the execution by such officer of the process of the state court.

Sargent v. Helton, 115 U. S. 348;
Leathe v. Thomas, 97 Fed. 136;
Phelps v. Mutual Reserve Co., 115 Fed. 956;
Evans v. Gorman, 115 Fed. 399;
Security Trust Co. v. Union Trust Co., 134 Fed. 301;
Dodds v. Palmer Tunnel Co., 188 Fed. 447.

VI. THE ORDER GRANTING THE INJUNCTION WAS ERRONEOUS, BECAUSE IT WAS ISSUED WITHOUT REQUIRING SECURITY OF APPELLEE.

By Act of Congress of October 15, 1914 (38 U. S. Statutes at Large, 738), it is provided:

> "Sec. 18. That except as otherwise provided in section 16 of this act (which has no application to the present case), no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby."

In the present case, the interlocutory order of injunction of August 19, 1915 (pages 71 and 72 of the transcript), makes no provision whatever for any security, and is therefore in clear violation of the statute. The injunction keeps the appellant Suter from the enjoyment and possession of property which appellee states to be worth $18,000.00; and if upon the trial it should appear that appellee was not entitled to the injunction, the appellant Suter would be damaged to the extent of the value of the use of the land for a long period of time, and also the amount of her costs and expenses in this litigation. Appellee himself is insolvent, judging from the allegation of the bill that he has been "without money to employ legal aid" (trans. p. 9). The denial of the statutory right to security upon the injunction therefore worked a serious injury to the rights of appellant Suter, for which the only remedy lies in the reversal of this order.

The right of the defendants to security is so clear that when the temporary restraining order was made, upon the filing of the bill, on July 30, 1915, an undertaking in the sum of $1,000.00 was required of appellee and was furnished by him. This undertaking (set out at pages 22 and 23 of the record) is by its terms restricted to the damage resulting from the temporary restraining order of July 30th, and so expired when the order to show cause was heard, and the new injunction of August 19th was issued. It is obvious that the company executing the bond of July 31st could not be held

for a violation of the later injunction of August 19th, which is broader in its terms than the restraining order, and that therefore this bond is no protection to appellant Suter; and it is equally obvious that if it was proper to require a bond of $1,000.00 on a restraining order which was to last for ten days, a far more substantial undertaking should be required where the appellant is to be kept out of property awarded to her by judgment, for whatever time may elapse until decision is rendered herein.

While the provision in the federal statute is a new one, and, so far as we are able to learn, has not yet been the subject of judicial interpretation, the language of the statute is so clear and unmistakable that no interpretation is necessary. In those states where a similar statute has been in force, it has been uniformly held that the requiring of a bond is a prerequisite to the granting of the injunction, and that if the bond is not required, the order granting the injunction must be reversed, though plaintiff would be otherwise entitled to it.

McCracken v. Harris, 54 Cal. 81;
Neumann v. Moretti, 146 Cal. 31.

It is equally clear that the bond on the temporary restraining order does not in any degree satisfy the statute. The case of State v. Green, 48 Neb. 327; 67 N. W. 162, had to do with a similar statute. In that case, a bond had been required and given on the temporary restraining order; and later a temporary injunction was granted, and the old bond

was ordered continued in force (a stronger case than the present one, because here the old bond was not ordered to stand). The court held that this was no compliance with the statute, saying:

> "Not only is there no statute which authorizes a court or judge to make an order dispensing with the giving of a bond in granting a temporary injunction, or to require that a former bond shall stand, but, if the requirements of the legislature mean anything, or are to be observed and enforced, a new bond should have been required of and given by the relator, to make the injunction effectual."

And the bond on the temporary restraining order is no protection at all to the appellants. It was so held in a case practically identical on this point, Moulton v. Cornish, 33 App. Cas. D. C. 228. There suit was brought on an undertaking given for a temporary restraining order, which, upon being brought on for hearing, was continued until the trial. The court held that the surety was not liable for any damages accruing from the time when the temporary restraining order was ordered continued *pendente lite,* and thereby became an injunction not within the terms of the bond. In the present case, the temporary restraining order was not merely continued in force, but was enlarged in its scope by the injunction order appealed from. It follows that appellant Suter has been deprived of the right to security given her by the statute, and that therefore the order granting the injunction was erroneous, and must be reversed.

VII. THE ORDER GRANTING THE INJUNCTION WAS ERRONEOUS, BECAUSE NOT SPECIFIC IN ITS TERMS.

Section 19 of the Act of October 15, 1914, referred to above, provides as follows:

> "That every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained. * * *" 38 Stat. at Large 738.

The order appealed from is as follows:

> "The application of plaintiff for an injunction *pendente lite* having been, upon due notice to the defendants herein, argued and submitted to the court, it is ordered that said application be granted, and that defendants be restrained as prayed for in the bill, until the trial and final determination of the cause" (transcript, pp. 71, 72).

This order does *not* set forth the reasons for its issuance, is *not* specific in its terms, and does *not* describe in reasonable detail the acts sought to be restrained, but *does* describe them only by reference to the bill of complaint. It therefore violates in every respect the provisions of section 19 quoted above. The impropriety of such a general order is especially striking where, as here, the bill prays for an injunction against the officer of a state court in the execution of its process.

VIII. THE COURT ERRED IN GRANTING THE INJUNCTION, BECAUSE IT APPEARED ON THE HEARING THAT THE JUDGMENT IN THE STATE COURT WAS NOT OBTAINED BY FRAUD, AND THAT APPELLEE WAS BOUND BY ITS FINDING AS TO HIS COMPETENCY.

As already stated, the appellants, in response to the order to show cause, made a full showing as to the allegations in the bill, and it is submitted that from the facts disclosed at the hearing, it fully appeared that appellee was not entitled to the injunction granted. The facts established were uncontroverted by him, in any material respect, and furnished such a complete answer to the charge of fraud that there is no room for the application of the rule allowing the trial court to pass upon contradictory statements of fact, in applications for interlocutory orders.

1. *As to the competency of the appellee.* Much is said in the bill about the sanity and competency of the appellee. On this fact the affidavits are, it is true, conflicting (see affidavit of Edward C. Harrison, p. 46; affidavit of Otto tum Suden, pp. 100-104, declaring him incompetent, and affidavit of Warner Temple, pp. 69, 70, indicating the contrary opinion) and although the preponderance of the testimony is against him on this question, nevertheless the whole question is foreclosed by the proceedings in the ejectment suit which are under attack. For it appears, by uncontradicted testimony, that on three separate occasions in the ejectment suit, the state court held him to be incompetent, and that on each of these occasions appellee had the

opportunity to be heard. In the first place, that court made on September 17, 1913, its order that appellee show cause on October 2, 1913, why a guardian *ad litem* should not be appointed because of his incompetency. This order was duly served, and after a hearing it was adjudged that appellee was incompetent and a guardian *ad litem* appointed (trans. pp. 29, 30). Such was the first adjudication of incompetency. Later, upon the trial of the cause, on December 9, 1913, the appellee August F. Krueger "was called as a witness for the plaintiff Sophie Suter, but upon the objection of his guardian *ad litem,* that he was incompetent to testify, he was examined by the court as to competency, and held incompetent, and withdrawn as a witness". Such was the second adjudication of incompetency, made in the presence of appellee and while he had every opportunity to protest. Finally, appellee appears after judgment has been entered against him, and through his attorney Arthur Crane, moves the court, on August 5, 1914, to set aside the proceedings against him, on the ground, among others, that he "is neither an infant nor insane, nor has been during the pendency of "the ejectment action. The motion is made before the state court upon the affidavit of appellee and another person respecting his sanity, and is opposed by counter-affidavits on the point; and the court, after considering the motion, denies it on August 17, 1914. (These proceedings are set out in full at pages 38 to 46 of the transcript.) Here, for the third time, in the action under

scrutiny here, the court, after notice and hearing, adjudicates appellee to be incompetent. In the face of these facts, it needs no argument to show that appellee cannot now, for the purpose of attacking these very proceedings, claim that the state court was in every instance wrong, merely because it suits his purpose so to do. In none of these instances is there the slightest shadow of a claim that the court was improperly influenced in its decision, and for the purpose of passing upon the validity of these proceedings, appellee must therefore be treated as an incompetent person.

2. *As to the alleged fraud of appellants.* All the facts surrounding the compromise agreement between the appellee's guardian *ad litem* and the appellant Sophie Suter are set out in the affidavits of Edward C. Harrison and Otto tum Suden, contained in the record. No question is made that on the first trial of the ejectment suit, the guardian *ad litem* took advantage of every point in favor of his ward; and indeed no such question could be made, for the guardian *ad litem* depended for his testimony upon Warner Temple, who now appears as attorney for the appellee. The testimony adduced on this first trial is set forth at pages 78 to 89 of the record. After the cause was submitted, the trial court rendered judgment for the appellee, the defendant in the ejectment suit. Thereafter in due time under the state statute, the plaintiff therein (the appellant Sophie Suter) moved the court for a new trial, and for the purpose of such motion, a

bill of exceptions was settled which was in all respects fair, full and correct (p. 98). From this bill, the guardian *ad litem* noticed for the first time that the judgment for appellee was erroneous in this respect: the witness Temple had testified that an appeal from the judgment of foreclosure was pending at the time the order setting aside that judgment was made (see testimony of Temple at the ejectment trial, p. 85: "I then filed a notice of appeal from the judgment, and gave $300 bond"). If this was true, and appellee's own lawyer said it was, then the order purporting to set aside the foreclosure decree was made in excess of the jurisdiction of the superior court, during the pendency of an appeal, and was absolutely void. An order cannot be made vacating a judgment as void, while an appeal is pending.

Parkside Co. v. McDonald, 167 Cal. 342.

An appeal having been taken must be presumed to be still pending.

People v. Durant, 119 Cal. 54.

The guardian *ad litem* also realized that if the order of the superior court setting aside the foreclosure decree was void for lack of jurisdiction, he could not hope to successfully attack the decree of foreclosure itself. It had developed on the trial that the only defect in the decree was the mere irregularity that the answer of defendant Farnham had not been filed. It had, however, been served, which constituted an appearance under the California law; and in addition, Farnham's attorney had

personally appeared at the trial and participated therein (see testimony to that effect of Geo. A. Clough, attorney for the Hibernia Bank, set out at pages 86 to 89 of the record). That this appearance was fully sufficient to give the court jurisdiction over the defendant's person could not be open to question.

Estate of Johnson, 45 Cal. 257;
Foley v. Foley, 120 Cal. 33, 39.

Thus the guardian *ad litem* found himself confronted with litigation in which he could not reasonably hope to be successful. Moreover, he knew that even if he did succeed in again securing judgment for his ward, the litigation would not be ended there, but would be prosecuted further, and his client had no means with which to defray the costs of this litigation. Meanwhile, the court had granted the new trial, as indeed it was bound to upon the law and facts above stated. Suppose, on the other hand, that appellee could succeed in obtaining a judgment in the ejectment action; he would still be confronted with the foreclosure of the mortgages of which appellant Suter was the owner or equitable assignee; and even if appellee were held to be the owner of the property, such ownership would be subject to such heavy liens against the property, that the equity of appellee was amount to little or nothing (see statement of liens against property, in affidavit of Edward C. Harrison, pp. 34 to 36). As a matter of duty to his ward, and in what must be held to be the highest good faith towards his inter-

ests, negotiations were opened between the guardian *ad litem* and the attorney for appellant Suter looking to a settlement of the controversy, in order that something might be saved therefrom for the appellee. The parties finally agreed upon the sum of $1500.00, which the guardian *ad litem* considered was the full value of any equity appellee might have, even if he prevailed in the litigation. The consideration which prompted the guardian *ad litem* to make the compromise are set forth in his affidavit in detail, at pages 95 to 101 of the transcript. He expressly states that the attorney for appellant Suter was fair in his conduct of these negotiations; and the record may be searched in vain for any evidence of overreaching or misrepresentation on the part of either party to the bargain.

Subsequently trial was had for the second time, and judgment passed for appellant Suter, which judgment is now being enjoined by the order appealed from. Now the fact is, that the second trial was had upon the stipulation of the parties that the court might consider before it all the evidence adduced on the first trial, and the court, having had its attention called to the invalidity of the order setting aside the foreclosure because of the pendency of an appeal, ordered judgment for the plaintiff therein and against the appellee. Thereupon a petition was filed setting out the compromise agreed upon (set out at pages 90 and 91 of the transcript), the compromise and all the considerations leading up to it were fully explained to Judge

Sturtevant, who had presided at the first trial (transcript, p. 37), and he made an order approving the compromise, under the power vested in him by section 372 of the Code of Civil Procedure, which is hereinbefore set forth.

Every circumstance, every fact disclosed, regarding the settlement, indicates the highest good faith towards the incompetent ward. There are but two suggestions made in appellee's affidavits which might be considered as evidencing a different state of affairs. One is that the guardian *ad litem* did not consult his ward about the settlement which was being negotiated. However, this is fully met by the affidavit of Mr. tum Suden, the guardian *ad litem,* wherein he states that the incompetency of his ward was so marked, as indicated by his surroundings at home, his manner of speech, his insane delusion that everybody was in a conspiracy against him, and his refusal to take care of his affairs, including his allowing judgments to go by default against him (see pp. 95, 96, 99, 100, 101, 102, 103, 104). To attempt to reason with such a half-crazed, irresponsible person was but time lost; and the proper and natural course was rather to explain the situation and the compromise to the court, which under the law was charged with the duty of looking after the interests of such incompetents as the appellee.

The other suggestion of impropriety made on behalf of appellee is that Mr. tum Suden, the guardian *ad litem,* was paid out of the compromise money, the sum of $250.00 for his services. It

appears that after the compromise had been made and approved by the court, and after the money had been paid over and the guardian had released errors in the judgment, the court then, upon his application, found that the sum of $250.00 would be reasonable compensation, and ordered it paid as such compensation out of the compromise money. In the first place, it is hard to see how any acts of the guardian *ad litem* could vitiate the settlement as against appellant Suter, after she had paid the money and it had been executed as between her and the guardian. But beyond that, no reason appears why this sum of $250.00 is not only reasonable, but exceedingly moderate for the services of the guardian *ad litem.* The court had the power to order the disposition of the fund; there is no claim that the judge was imposed upon, or that any facts were misstated to him; and in short, the whole transaction carried on, as it was, in the open and with no attempt at concealment, bears every ear-mark of the most proper motives.

For want of a better basis for a claim of fraud, appellee's counsel may urge as an indication of fraud that although a judgment had already been rendered in his favor, his claim was settled for a small proportion of the value of the property. It is a sufficient answer to this argument to point to the record which was before the state court, from which it was clear to the guardian *ad litem,* and equally clear to the state court, when it came to pass on the motion for new trial, that the first judgment

was erroneous upon the testimony adduced. That testimony is in the record, and it will be apparent upon perusing it that the state court was obliged to grant the motion for new trial, because the foreclosure decree was valid, and the order setting it aside in excess of the court's jurisdiction because made pending appeal. Not only was the order granting a new trial correct, but on such new trial, a judgment for appellant Suter would have been inevitable, and the only practical question for consideration by the guardian *ad litem* was how something might be saved for his insane ward out of what was admittedly only an interest subject to liens well-nigh aggregating the value of the property itself.

From the foregoing facts it is submitted that the district court erred in the issuance of the injunction, because the allegations of the bill, in so far as they were directed at the subject of fraud, were controverted by unmistabable and convincing evidence.

IX. THE COURT ERRED IN GRANTING THE INJUNCTION, BECAUSE IT APPEARED THAT APPELLEE HAD ATTACKED THE JUDGMENT IN THE STATE COURT ON THE GROUND HERE URGED; AND THE FAILURE OF SUCH ATTACK PRECLUDES HIM IN THIS SUIT.

Reference has already been made to the motion made by appellee in the ejectment suit on August 7, 1914, before the state court, by which he sought to have set aside the proceedings here complained of.

And we have already called attention to the statute, section 473 of the Code of Civil Procedure of California, under which this motion could be made on all the grounds urged by appellee here. From the papers used on the motion, it appears that it was based on the alleged competency of appellee, on the want of authority of the guardian *ad litem* to act for him, on the claim that the court was not advised regarding the facts surrounding the compromise; and it further appears from the affidavit of Krueger used on said motion, that his prior ignorance of the settlement, and of the allowance of a fee to the guardian *ad litem,* were also brought to the attention of the court. It is to be noted that this motion was made by a separate attorney, and in hostility to the guardian *ad litem.* After hearing on conflicting affidavits, the court, on August 17, 1914, made its order denying the motion (pp. 38-46).

The appellee, then, not only had a plain, speedy and adequate remedy at law; but he took advantage of that remedy, and after full hearing, the state court held that his claims were without merit. Therefore, on elementary principles of *res adjudicata,* appellee is now without any standing in this new suit based upon the same grounds.

Hendrickson v. Bradley, 85 Fed. 508; *certiorari* denied, 171 U. S. 686;
Folsom v. Ballard, 70 Fed. 12;
Travelers' Assn v. Gilbert, 111 Fed. 269, 276.

In these cases, suits for relief against judgments on the ground of fraud were before various Circuit

Courts of Appeals; and it was held in all of them that where the complainant had, by motion in the state court, raised his objections before the court which had rendered the judgment, and where that court was empowered to relieve against the judgment, but had, after a hearing, denied his motion, he was then precluded from asking in the federal courts for relief against the same judgment, on the grounds already urged, or on any grounds that might have been urged, in support of the motion in the state courts. This, of course, is the necessary corrollary of the rule of Nougue v. Clapp, which denies relief where there is an adequate remedy at law, and it furnishes the final and conclusive answer to appellee's claim for injunctive relief.

It is respectfully submitted that the order and interlocutory decree should be reversed, and the bill dismissed.

Dated, San Francisco,
March 8, 1916.

Edward C. Harrison,
Maurice E. Harrison,
Solicitors for Appellants.